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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM 1946 No. 372

In the Matter of Proving the Last Will and Testament of HENRY ALTMAYER,

Deceased,

as a Will of Real and Personal Property.

EMIL H. WASSERBERGER,

Petitioner,

v.

BEATRICE ALTMAYER RODNEY,

Respondent,

and

DONALD T. MULLANE,

Special Guardian.

AFFIDAVIT AND BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

VAUGHAN AND LYONS,
Attorneys for Respondent.

JAMES N. VAUGHAN,
of Counsel.

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IN THE

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BEATRICE ALTMAYER RODNEY,

Respondent,

and

DONALD T. MULLANE,

Special Guardian.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JAMES N. VAUGHAN, being duly sworn, deposes and says:

1. I am a lawyer duly admitted to practice in all the Courts of New York State. I am also admitted to prac-

tice before this Court. I represent the respondent on the present application for a writ of certiorari.

2. The respondent engaged my services in the first instance after the reversal of the Surrogate's decree by the Appellate Division of the Supreme Court. I am therefore personally familiar with the facts hereinafter set forth since I have continuously represented her since that time.

3. The first order of the Appellate Division was dated the 27th day of June, 1945. A copy thereof is annexed hereto and marked Exhibit A. This order was not entered until the 14th day of August, 1945. My client thereafter duly noticed an appeal from said order. Said notice was served on or about September 19, 1945.

4. On notice dated September 27, 1945 the successful party in the Appellate Division, namely, Mr. Wasserberger moved that Court for resettlement of its order of reversal. To support the motion an affidavit was made, served and filed by Lawrence S. Timen. Copy of said affidavit dated the 27th day of September, 1945 and sworn to before Mr. Wasserberger is annexed hereto and marked Exhibit B.

5. I made an affidavit in this proceeding dated March 1, 1946, a copy of which is annexed hereto and marked Exhibit C.

6. The sequel to the final decision by the Court of Appeals on the merits follows:

> January 22, 1946 the remittitur was filed with the Clerk of the Surrogate's Court, New York County (the decision of the Court of Appeals having been published in the New York Law Journal January 19, 1946).

February 20, 1946, with the express consent of Mr. Wasserberger and the Special Guardian, the Surrogate's Court by order reinstated the Letters of Administration originally issued to my client but revoked following the reversal in the Appellate Division.

March 22, 1946 a decree on remittitur was made fully effectuating the determination in the Court of Appeals and also fixing costs and counsel fees for Mr. Wasserberger and the Special Guardian. Mr. Wasserberger claimed as his compensation for prosecuting his appeals unsuccessfully the sum of $25,000. He was allowed $2,500.

March 23, 1946 my client as Administratrix paid through me to Mr. Wasserberger his costs and disbursements in the sum of $423.34.

April 3, 1946 notice of motion in the Court of Appeals for reargument and to amend the remittutur was served.

April 18, 1946 the motion for reargument was denied.

April 23, 1946 Mr. Wasserberger noticed an appeal to the Appellate Division from so much of the decree on remittitur as fixed his allowance for counsel fees in the sum of $2,500.

I later duly made a motion to dismiss the last mentioned appeal for failure to make the case and to bond the appeal. This motion was granted to the extent of requiring Mr. Wasserberger to file the required undertaking, make the case and notice the appeal for argument on a date stated by the Appellate Division. The appeal has been noticed for argument September 27, 1946.

Affidavit of James N. Vaughan.

On July 11, 1946 Associate Justice Reed made an order ex parte extending Mr. Wasserberger's time to apply for a writ of certiorari to August 7, 1946.

August 6, 1946 petition for writ of certiorari was filed in the Supreme Court.

August 15, 1946 copy of the transcript of record, petition and brief were served on respondent's counsel.

JAMES N. VAUGHAN.

Sworn to before me this
7th day of September, 1946.

JESSIE L. NAPOLETANO,
Notary Public,
Bronx County.
Bronx Co. Clk's No. 27, Reg. No. 69-N-7.
New York Co. Clk's No. 251, Reg. No. 210-N-7.
Kings Co. Clk's No. 21, Reg. No. 161-N-7.
Queens Co. Clk's No. 2164, Reg. No. 112-N-7.
Commission Expires March 30, 1947.

Exhibit A.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 27th day of June, 1945.

Present: Hon. FRANCIS MARTIN, P. J.
" ALFRED H. TOWNLEY,
" EDWARD J. GLENNON,
" ALBERT COHN,
" JOSEPH M. CALLAHAN.

In the Matter of Proving the Last Will and Testament of

HENRY ALTMAYER,
Deceased,

as a Will of Real and Personal Property.

EMIL H. WASSERBERGER,
Proponent-Appellant,

BEATRICE RODNEY ALTMAYER,
Objectant-Respondent,

DONALD T. MULLANE,
Special Guardian-Respondent.

15651

ORDER OF REVERSAL ON APPEAL FROM SURROGATE

An appeal having been taken to this Court by proponent-appellant EMIL H. WASSERBERGER, from so much of a decree of the Surrogate's Court of the County of New York, entered in the Surrogate's Court on the 23rd day of June, 1944, as denies probate of a carbon copy of an instrument alleged to be a will dated May 1, 1937, and said appeal having been argued by Mr. Lawrence S. Timon, of counsel for the appellant, and by Mr. George

Feinberg, of counsel for the objectant-respondent, and by Mr. Donald T. Mullane, special guardian-respondent, pro se; and due deliberation having been had thereon, it is hereby unanimously

ORDERED and ADJUDGED that the said decree so far as appealed from be and the same is hereby, in all things reversed upon questions of fact and of law, with costs to the appellant Emil H. Wasserberger and to the special guardian, Donald T. Mullane, payable out of the estate, and it is further

ORDERED, ADJUDGED and DECREED that the carbon copy of an instrument propounded as decedent's will dated May 1, 1937, be and the same hereby is admitted to probate as the Last Will and Testament of Henry Altmayer, Deceased, and the proceeding remitted to the Surrogate of the County of New York for further action in accordance with the opinion of this Court.

Enter,

A. H. T.

Exhibit B.

APPELLATE DIVISION OF THE SUPREME COURT

First Judicial Department

In the Matter of Proving the Last Will and Testament of

Henry Altmayer,

Deceased,

as a Will of Real and Personal Property.

Emil H. Wasserberger,
Proponent-Appellant,

Beatrice Rodney Altmayer,
Objectant-Respondent,

Donald T. Mullane,
Special Guardian-Respondent.

State of New York
County of New York } ss.:

Lawrence S. Timen, being duly sworn, deposes and says:

I am of counsel for the proponent-appellant herein associated with Edwin B. Wolchok, Esq., attorney of record for said appellant.

This is an application to resettle the order of reversal on appeal from the Surrogate of the County of New York, which said order was entered and filed in the office of the Clerk of this Court on August 14, 1945.

The application for resettlement is made for the reason that the said order as made and entered herein con-

tains a statement that the reversal was upon the law and the facts but fails to specify, as required by Section 602 of the Civil Practice Act, the findings of fact of the court below which was reversed or modified and the new findings made by the Appellate Division.

The order of reversal was made not only upon the law, but upon the facts, and the order so states. The salient facts upon which the Surrogate was reversed are that after its execution, the will was placed in a safe deposit box of the Manufacturers Trust Company subject to the joint control of the deceased and the contestant, and that the will remained in the box up to at least the early part of January 1944; that the deceased died on February 1, 1944, and that the only person who had access to the box where the will was deposited after deceased was bedridden for several months prior to his death, was the contestant. Since this Court found as a fact that the will was in the box in January 1944, within a month of testator's death, and that the only person who had access to the box during the *several* months decedent was bedridden, was the contestant, it necessarily follows as a fact that the will was in existence in the said box at the time of decedent's death or was fraudulently destroyed during his lifetime.

The findings of fact contained in the decision of the Surrogate are precisely to the contrary, and the Surrogate's findings are therefore reversed by the findings of this Court.

Under the last sentence contained in Section 602 of the Civil Practice Act, the proponent would be prejudiced unless the order were resettled to specify the findings of this Court and the findings of the court below which were reversed in that in the absence of such specification, there would be a presumption in the Court of Appeals, upon

appeal to that Court, that finding of fact made by the Surrogate that the will could not be found at testator's death, was affirmed and that the reversal in this Court was upon questions of law only.

This is particularly significant in view of the fact that the contestant urged a proposition of law in the court below and in this court that by reason of the non-production of the will by proponent there arises a presumption that the testator destroyed his will with intent to revoke. However, the finding of fact in this Court that the will was in existence at the time of the decedent's death or was fraudulently destroyed during his lifetime destroys the basis upon which the presumption depends. Consequently, unless the order on reversal sets forth the facts found by this Court showing that the will was in existence at the time of decedent's death or was fraudulently destroyed during his lifetime, the Court of Appeals will presume that the reversal was upon questions of law only.

Resettlement is therefore asked so that if the Court of Appeals deems fit to sustain the presumption of destruction animo revocandi urged by the contestant in this Court and in the court below, it would need to do so only after reviewing the facts and reversing the findings of fact made in this Court, instead of presuming that this Court agreed with the Surrogate that the will could not be found at the time of the testator's death.

An appeal has now been taken to the Court of Appeals from the order of reversal herein by notice of appeal dated September 18, 1945 and served September 19, 1945. It is accordingly requested that the said order be resettled nunc pro tunc without prejudice to any of the proceedings taken thereafter.

Exhibit B.

WHEREFORE, deponent prays that said order of reversal be resettled accordingly.

LAWRENCE S. TIMEN.

Sworn to before me this
27 day of September, 1945.

EMIL H. WASSERBERGER,
Comm. Deeds, New York City.
Term Exp. 4/18/46.

Exhibit C.

SURROGATE'S COURT

NEW YORK COUNTY

In the Matter of the Application for Letters of Administration on the Goods, Chattels and Credits of

HENRY ALTMAYER,

Deceased.

In the Matter of Proving the Last Wi and Testament of

HENRY ALTMAYER,

Deceased,

As a Will of Real and Personal Property.

AFFIDAVIT

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

JAMES N. VAUGHAN, being duly sworn, deposes and says:

On September 11, 1945 a conference was had at the Chambers of Surrogate Delehanty in the above matter. In course of that conference we requested $2,000 from the estate in behalf of my client who regardless of the outcome of the appeal then contemplated was the main owner of the funds formerly of her father. Mr. Timen was willing unconditionally to consent that this money should be paid my client. When he spoke with Mr. Wasserberger about it in my presence Mr. Wasserberger immediately raised the question of Mr. Timen's authority as his lawyer to give such consent. He endeavored to ground his consent on an express understanding that he (Mr. Wasserberger) should have commissions on the

money on the assumption that he would prevail in the Court of Appeals. To this proposal I was unwilling to assent on the ground stated by me that a contract affecting commissions would be illegal. Mr. Wasserberger insisted that at any rate the payments to Mrs. Rodney should be without prejudice to his rights regarding commissions on the sum. To this I agreed and Mr. Timen reported the nature of the understanding to the Surrogate.

JAMES N. VAUGHAN.

Sworn to before me this
1st day of March, 1946.

JESSE L. NAPOLETANO,
Notary Public,
Bronx County.
Bronx Co. Clk's No. 27, Reg. No. 69-N-7.
New York Co. Clk's No. 251, Reg. No. 210-N-7.
Kings Co. Clk's No. 21, Reg. No. 161-N-7.
Queens Co. Clk's No. 2164, Reg. No. 112-N-7.
Commission Expires March 30, 1947.

IN THE

Supreme Court of the United States

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as a Will of Real and Personal Property.

EMIL H. WASSERBERGER,

Petitioner,

v.

BEATRICE ALTMAYER RODNEY,

Respondent,

and

DONALD T. MULLANE,

Special Guardian.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT.

I.

Essentials decisive of present application for writ of certiorari and requiring denial thereof.

II.

No constitutional questions were passed on below in the course of a "rehearing".

III.

Detailed demonstration that there was absolute procedural and substantive regularity in all courts below.

IV.

Answers to certain particulars in Mr. Wasserberger's present claims.

V.

Mr. Wasserberger by his own act set up the order of the Appellate Division so that it might be reviewed on the facts precisely as happened in the Court of Appeals.

VI.

Mr. Wasserberger expressly, in terms, anticipated the very action taken by the highest Court of Appeals in making its final judgment.

VII.

The "facts" of Mr. Wasserberger are not facts; and even the actual evidentiary facts leading to the result below are presently immaterial.

VIII.

Collateral facts warrant a direction by this Court that the respondent should be allowed double costs.

IX.

Conclusion.

POINT I

Essentials decisive of present application for writ of certiorari and requiring denial thereof.

Stated succinctly this is what happened. Mr. Wasserberger offered for probate in New York County a conformed copy of a will made by deceased in 1937. The original will he claimed was fraudulently destroyed (fol. 24). Mrs. Rodney answering the claims of Wasserberger contended (1) that probate should be denied because the paper propounded was not an original will; (2) that probate should be denied because the original had been revoked; and (3) that probate should be denied because of the non-occurrence of those facts and circumstances which Wasserberger set forth in his petition as making out his case of fraudulent destruction (fols. 70-72).

The issues were tried by a Surrogate. He denied probate stating that the presumption of destruction *animo revocandi* attached to the 1937 instrument by reason of its non-production since the original had been delivered to the deceased (fol. 811). On all the facts the Surrogate concluded that Mr. Wasserberger as proponent had "* * * failed to carry the burden which was upon him to establish the indispensable fact of destruction in fraud on deceased * * *" (fol. 813).

The Appellate Division of the Supreme Court reversed. It made new findings of fact (fols. 845-6).

The Court of Appeals unanimously reversed the order of the Appellate Division and affirmed the Surrogate's decree on the ground that the Surrogate's findings were in accordance with the weight of the evidence (Record p. 359).

At no time prior to the final determination by the Court of Appeals was any constitutional or Federal question presented or suggested by anybody.

The attempt to assert alleged rights arising under the Fourteenth Amendment was made by Mr. Wasserberger via a motion for reargument and to amend the remittitur. The motion was denied with the following memorandum (295 N. Y. 894):

> "Motion by respondent Emil H. Wasserberger for reargument and to amend the remittitur denied, with $10 costs and the necessary printing disbursements. (See 295 N. Y. 693.)"

On the basis of well established authority, the facts in the case, as briefly outlined above, require denial of the present petition for a writ of certiorari.

Fullerton v. *Texas,* 196 U. S. 192;
McMillen v. *Ferrum Mining Co.,* 197 U. S. 343;
Corkran Oil & Development Co. v. *Arnaudet,* 199 U. S. 182;
McCorquodale v. *State of Texas,* 211 U. S. 432;
Forbes v. *State Council of Virginia,* 216 U. S. 396;
Consolidated Turnpike Company v. *The Norfolk, etc. Ry. Co.,* 228 U. S. 326;
St. Louis & San Francisco R. R. Co. v. *Shepherd,* 240 U. S. 240;
American Surety Co. v. *Baldwin,* 287 U. S. 156;
Helis v. *Ward,* 308 U. S. 365.

POINT II

No constitutional questions were passed on below in the course of a "rehearing".

The petitioner says that:

> "An order on rehearing denied petitioner's motion for reargument and to amend the remittitur to recite constitutional questions raised" (Petition p. 1).

On page 10 of petitioner's brief he identifies the word "rehearing" as a synonym for the word "reargument".

There was no rehearing. There was no reargument. There was simply a motion for reargument which the Court of Appeals denied with costs. The effort of petitioner (if he is making the effort) to suggest that he was afforded a "rehearing" may find its explanation in the fact that had the Court of Appeals passed on the alleged constitutional questions when it received the motion for reargument the United States Supreme Court might have gained jurisdiction to review such action. This point is adequately shown by the following language in *Fullerton* v. *Texas* (*supra*) (p. 193):

> "We have repeatedly ruled that it is too late to raise a Federal question by a petition for rehearing in the Supreme Court of a State after that Court has pronounced its final decision, although if the State Court entertains the petition and disposes of the Federal questions, that will be sufficient. *Mallett* v. *North Carolina,* 181 U. S. 589. In that case it was observed: 'Had that Court declined to pass upon the Federal question and dismissed the petition without considering them, we certainly would not undertake to revise their action'."

The Court of Appeals in the present case did not pass on any Federal or constitutional questions. It simply denied a motion for reargument.

POINT III

Detailed demonstration that there was absolute procedural and substantive regularity in all courts below.

Petitioner confuses the issue, the holding and the opinions in the courts below. The sole issue was whether a copy of a 1937 will of deceased was entitled to probate,

The ultimate holding was that such copy was not entitled to probate.

The opinion of the Surrogate who tried the case and his findings of fact differed from the opinion of the intermediate appellate court and its findings of fact. The Court of Appeals indicated briefly that it agreed (unanimously) with the views of the Surrogate.

What happened below is seriously distorted by the petition now made for a writ.

To set the matter straight some detail, with accurate references to the record, is necessary.

(a) Proceedings in Surrogate's Court:

The proceeding began with a petition by Mr. Wasserberger for probate of a copy of a will concededly executed by deceased about seven years before his death. Mr. Wasserberger alleged that the original will "has been lost or destroyed, by accident or design, and that the said Will was in existence at the time of deceased's death, or was fraudulently destroyed in his lifetime, * * *" (fol. 24).

In addition to denial of the material allegations in Wasserberger's petition Mrs. Rodney by her answer pleaded (a) that the paper tendered for probate could not be probated because "it is not an original will"; and (b) that the paper in question had been "duly revoked" in the lifetime of deceased. She did not by her pleadings specify any theory of revocation (fol. 71).

The Surrogate not only formulated the nature of the question he had to try but in fact Mr. Wasserberger's lawyer agreed to the correctness of the Surrogate's views on this point. The Surrogate early in the trial said (fol. 125):

> "All I am concerned with from this point on is the question whether or not a fraudulent destruction

of the will was accomplished, either before or after death."

Mr. Wasserberger did not then through his lawyer criticize this notion. A moment later the Surrogate said (fol. 130):

"The only thing I have in mind as the presently triable issue is the one of fraudulent destruction."

Whereupon Mr. Wasserberger's lawyer said:

"Correct, Judge * * *."

At the end of Mr. Wasserberger's *prima facie* case in favor of probate, the Surrogate was presented by Mrs. Rodney with a motion to dismiss placed squarely on the rule of law in New York (*Matter of Staiger,* 243 N. Y. 468), that an unproduced original will delivered to the testator's possession is presumed to have been duly revoked by him in the absence of affirmative proof to the contrary (fols. 451-452). This motion led the Surrogate to say (fols. 453-454):

"* * * the question is whether or not you (Mr. Wasserberger—proponent) have shown anything that will reverse the presumption that the will, not being found, was destroyed by the testator with intention to revoke."

The long statement then made by Mr. Wasserberger's lawyer did not in the slightest degree question the correctness of the Surrogate's view as to the *question* he had to decide in order to determine the *issue* before him, to wit: whether the copy of the 1937 will should be probated.

Finally, the dependence of the contestant on the rule of law in New York formulated by *Matter of Staiger*

(*supra*) was at no point abandoned for we find Mrs. Rodney at the very end of the trial renewing her motion predicated on that rule of law (fols. 771-772).

The opinion of the Surrogate when delivered contains substantially two holdings: First that "the presumption of destruction *animo revocandi* attaches to the instrument of 1937 by reason of its non-production since the original was delivered to deceased" (fol. 811). Second that

> "The Court holds that the proponent has failed to carry the burden which was upon him to establish the indispensable fact of destruction in fraud on deceased and accordingly denies the prayer of the petition for probate of the copy" (fol. 813).

The decree, which is the holding of the Surrogate's Court, recites that that Court had duly taken proof "among other things as to the existence of the original of said will at the time of the testator's death, and as to the alleged fraudulent destruction of said will during the lifetime of the testator" (fols. 15-16). The decree then orders, adjudges and decrees that the copy of the 1937 will "be and the same hereby is rejected and denied probate" (fol. 16). There never was any constitutional question raised on the trial. Mr. Wasserberger did not then claim he lacked "notice" of Mrs. Rodney's position. He did not claim he had been denied "fair play". And he did not claim that the decree the Surrogate made contained holdings inconsistent with the pleadings.

(b) Appeal to Appellate Division:

If Mr. Wasserberger at any time had had some constitutional rights within the meaning of subdivision (b) of Section 344 of Title 28 of the United States Code (Judicial Code Sec. 237, amended), rights which he might "spe-

cially set up" it was at this stage of the proceeding that his opportunity specially to set them up existed. He might then have noticed his appeal on such alleged grounds. But he did not do so. The text of his notice of appeal indicates that he "appeals from so much of said order and decree as rejects and denies probate of the instrument dated May 1st, 1937, propounded as a copy of the Last Will and Testament of Henry Altmayer, deceased" (fol. 9).

The jurisdiction of the Appellate Division of the Supreme Court on an appeal from a decree of the Surrogate's Court enables that Court to take in new facts (Sec. 309 Surrogate's Court Act). It did so in the proceeding at the instance of Mr. Wasserberger. Such facts did not alter the essential shape of the proof as it came before the Surrogate.

The Appellate Division explicitly reversed the fact findings of the Surrogate; and made its own new findings of fact as appears from its resettled order (fols. 844-847) which became the subject matter of Mrs. Rodney's appeal to the Court of Appeals (fols. 831-832). It is noteworthy that the Appellate Division's order is in substance an express holding that Mr. Wasserberger did do what the Surrogate said he had not done. That Court held that Mr. Wasserberger established by his proof either that the original will existed when testator died or that it had been fraudulently destroyed in deceased's lifetime (fol. 847). It expressly disapproved the fact findings of the Surrogate and enumerated such disapproved findings (fol. 845).

It should here be borne in mind that it was Mr. Wasserberger who prepared the order (fol. 838). It therefore expresses his view of what the Appellate Division decided. (See affidavit of James N. Vaughan prefixed to this brief.)

(c) Appeal to Court of Appeals:

The appeal to the Court of Appeals was duly taken by Mrs. Rodney from "each and every part" of the Appellate Division's resettled order (fol. 832). This appeal was of right (Civil Practice Act, Sec. 588). Since the Appellate Division on reversing the Surrogate's Court had found new facts, the jurisdiction of the Court of Appeals extended to review of both the facts and law (Art. 6, Sec. 7, Constitution of the State of New York; Sec. 602, Civil Practice Act).

The Court of Appeals had for decision sharply controverted questions of fact. The Surrogate's fact findings had been specifically rejected by the Appellate Division which made its own findings of fact. In this situation the highest court decided "that the findings of the Surrogate are in accordance with the weight of the evidence" and that "* * * it is considered that the said order (appealed from) be reversed and decree of Surrogate's Court affirmed with costs in this Court and in the Appellate Division" (Record p. 359).

Of course, there were many law questions argued to the Court of Appeals not only by Mr. Wasserberger but also by Mrs. Rodney. But the cause simmered down to the fact question and that Court saw the facts and the controlling law as the Surrogate saw them. So viewing the facts and law, the Court of Appeals could and did briefly determine for reversal.

(d) Summary respecting the proceeding below:

Regularity features the proceedings below at every stage thereof. The issue was one of probate or non-probate of a copy of a will. It turned on the question whether the original instrument, which was unproduced, had been fraudulently destroyed. On this subject the burden of proof rested with the proponent. The Surro-

gate held he failed to carry this burden. The Appellate Division held he did. The Court of Appeals held he did not.

The nature of the law question to be decided was formulated by the Surrogate at the trial. It was never denounced by Mr. Wasserberger as amounting to a denial to him of due process or of equal protection of the laws. Indeed Mr. Wasserberger assented at the trial to its correctness. No constitutional claims were made by Mr. Wasserberger on the later appeals. It was only after he had been defeated in the highest court of the State after a full hearing on briefs and argument that he contrived his present theory of denial of due process and of equal protection of the laws.

POINT IV

Answers to certain particulars in Mr. Wasserberger's present claims.

Assuming for discussion only that by way of a motion for reargument of a finished case a constitutional question might be injected into the cause though it was never theretofore asserted, some consideration may be given Mr. Wasserberger's claims on their merits.

First he says he was denied due process of law. He puts it this way (Petition p. 2):

> "The federal question involves a denial of due process of law in giving judgment on a defense other than that pleaded and proved. The relief granted contestant was not within the grounds relied on by her to obtain it."

Mr. Wasserberger here inverts what happened. There was not so much a grant of relief to contestant as there was a denial of relief to the petitioner. Mr. Wasser-

berger failed to sustain the burden of proving a fraudulent destruction of the original will. He had that burden at all times. The Surrogate said so repeatedly not only with no dissent by Mr. Wasserberger during the trial but with his express assent through his lawyer to the correctness of this view (fol. 130).

If it may be said that Mrs. Rodney was "granted relief" it is nevertheless not true to say she received it on grounds distinct from grounds on which she relied. This can be demonstrated. In her answer asking denial of probate to the copy of the will she alleged (fol. 70):

> "First: That the paper propounded for probate herein, is invalid as a Last Will and Testament of Henry Altmayer, deceased, and is illegal and void in that it is not an original will."

The ultimate decision is plainly consistent with that allegation. The propounded paper was not an original instrument. The original was delivered into custody of deceased. It therefore had to be denied probate unless its fraudulent destruction were proved by Mr. Wasserberger.

The answer of Mrs. Rodney also has this allegation (fol. 71):

> "Second: That the said paper is not the Last Will and Testament of decedent, in that it was during his lifetime duly revoked by him" (fol. 71).

This allegation is consistent with any kind of revocation including revocation presumed to have happened because the original will was not produced and its fraudulent destruction was not proved.

Mr. Wasserberger also says that "No notice was ever given of any claim that after a search the will could not be found" (Petition p. 3). This statement is untrue.

Such notice is contained in Mr. Wasserberger's Exhibit 7 (fols. 796-800). It is also in the Petition of Mrs. Rodney for letters of administration put before the Appellate Division by Mr. Wasserberger himself (fols. 848-854). It is also the fact that the safe deposit box of deceased was searched for a will in Mr. Wasserberger's presence and no will was found. (Incidentally Mr. Wasserberger never conceded the paper was not in the box although the representative of the State Tax Commission said such was the fact.) (fols. 223-224). Moreover the theory of the probate proceeding was that a copy was offered in lieu of the original will because the original could not be found (fol. 24).

Mr. Wasserberger explains the second alleged federal question as follows (p. 4):

> "The second federal question, involving equality of treatment under the equal protection clause of the 14th amendment, arises out of the refusal of the court below * * * to decide the question of law as to revocation presented upon the appeal * * *".

What the Court of Appeals did was to reverse the order of the Appellate Division and to approve the decree of the Surrogate's Court. If it failed to decide what Mr. Wasserberger calls "the question of law as to revocation" then so too did the Surrogate in the first instance. But this constitutional ground of appeal if it ever existed was not asserted at any time by Mr. Wasserberger until his definitive defeat in the Court of Appeals.

Moreover the Court of Appeals was not presented with a "question of law as to revocation". It was presented with an appeal to it taken by Mrs. Rodney from "each and every part" of the resettled order of the Appellate Division,—a very different thing indeed. It was an appeal to the Court of Appeals to exercise its constitutional power to review facts and to overturn the fact findings

of the Appellate Division. That Court's problem was to review the whole record in the light of the character of the appeal.

Mr. Wasserberger speaking apparently of both alleged constitutional questions and attempting to explain why he never raised them until after losing in the Court of Appeals says:

> "The federal question arose from the unanticipated disposition of the case at the close of proceedings upon the appeal in the Court of Appeals."

Unanticipated by whom? The disposition made of the case by the Court of Appeals was the hoped for outcome which actuated Mrs. Rodney when she appealed for justice to that Court. (And see Point VI below where is shown proof that Wasserberger in terms anticipated what in fact happened in the Court of Appeals.)

POINT V

Mr. Wasserberger by his own act set up the order of the Appellate Division so that it might be reviewed on the facts precisely as happened in the Court of Appeals.

It is odd to find Mr. Wasserberger claiming that the Court of Appeals had no right to reverse on the facts. It was he who insisted on a resettled order by the Appellate Division which contained express holdings of fact by that Court thereby making it unnecessary for the Court of Appeals to confine its review to questions of law on the theory that the Appellate Division had affirmed the holding of fact by the Court of original jurisdiction (see § 602 Civil Practice Act). The original order made by the Appellate Division (see Exhibit A to the prefixed annexed affidavit of James N. Vaughan) had merely reversed "upon questions of fact and law" with-

out stipulating what new facts it had found. In case of an appeal from an order in that form the Court of Appeals may, but will not necessarily, send the case back to the Appellate Division that the latter Court may amend its order to show its new fact findings (*Hart* v. *Blabey*, 287 N. Y. 257). When the facts newly found are, however, shown in the order of the Appellate Division reversing the Court of original jurisdiction on the facts then, under the State Constitution and Civil Practice Act, the Court of Appeals indubitably has the power to review the facts found by the intermediate Court and in a suitable case, such as the present case, to reverse them. It has acted thus in other cases, of course. For example see *Aerated Products Co.* v. *Godfrey*, 290 N. Y. 92, 95 and *Pocket Books, Inc.* v. *Meyers*, 292 N. Y. 58, 61.

Mrs. Rodney first appealed to the Court of Appeals, from the order of the Appellate Division in its original form. Strategically her position as appellant, looked at prospectively, would have been better on an appeal from an order in that form than from an order whereby the Appellate Division made express fact findings. In the former alternative she would have had the benefit of a presumption that the reversal by the Appellate Division had been made solely on questions of law. She, therefore, opposed the making of the resettled order. Nevertheless a resettled order was made and it became the subject matter of the appeal to the Court of Appeals.

POINT VI

Mr. Wasserberger expressly, in terms, anticipated the very action taken by the highest Court of Appeals in making its final judgment.

Independently of everything heretofore stated in this brief it chances that in this case the non-existence of Mr. Wasserberger's alleged right to a writ can be shown out of his own mouth. Basically he now claims that Mrs.

Rodney was granted relief "not within the grounds relied on by her to obtain it and which was not responsive to the issue tendered and heard" (Brief p. 18). For this reason he says he was denied "due process". And he was denied "equal protection of the laws" he says because the Court of Appeals did not decide "the question of law as to revocation presented upon the appeal" (Petition p. 4).

That both of his claims are unsound the objective facts demonstrate.

But what is more he makes his present petition knowing they are unsound. He knows that Mrs. Rodney did rely on the presumption of revocation of the original Will in the absence of proof of fraudulent destruction and that she relied on it in every Court below. That Mr. Wasserberger had that knowledge appears from the affidavit made by his lawyer, Mr. Timen, under date 27 September 1945 and sworn to by Mr. Timen before Mr. Wasserberger himself, the latter acting in his quality of a Commissioner of Deeds in New York City.

The affidavit in question was made by Mr. Timen to support a motion in the Appellate Division to resettle the order of reversal made by that Court. The full text of that affidavit is submitted as Exhibit B to the prefixed affidavit of James N. Vaughan. Mr. Timen opens his affidavit by showing that reversal was put by the Appellate Division on both facts and law; that the facts found by the Surrogate materially differed from the facts found by the Appellate Division; that under the last sentence of § 602 Civil Practice Act unless the Appellate Division by its order stipulated the facts reversed and the new facts found the Court of Appeals would presume the reversal was made solely on the law; and that this would be prejudicial to Mr. Wasserberger. Then he says:

> "This is particularly significant in view of the fact that the contestant (i. e., Mrs. Rodney who is the

> respondent in regard to the present petition for a writ of certiorari) urged a proposition of law in the Court below (i. e., the Surrogate's Court) and in this Court (i. e., the Appellate Division of the Supreme Court) that by reason of the nonproduction of the will by proponent there arises a presumption that the testator destroyed his will with intent to revoke.
> • • •
>
> "Resettlement is therefore asked so that if the Court of Appeals deems fit to sustain the presumption animo revocandi urged by the contestant in this court and in the court below, it would need to do so only after reviewing the facts and reversing the findings of fact made in this court, instead of presuming that the court agreed with the Surrogate that the will could not be found at the time of the testator's death."

The action taken unanimously by the Court of Appeals thus exactly answers to the specifications set forth in advance by Mr. Wasserberger himself (through his lawyer).

POINT VII

The "facts" of Mr. Wasserberger are not facts; and even the actual evidentiary facts leading to the result below are presently immaterial.

The "Facts" according to Mr. Wasserberger (Petition pp. 7-10) are not the genuine evidentiary facts. They are Mr. Wasserberger's version of the evidentiary facts. Mrs. Rodney's testimony on material facts differed radically from that of her ex-lawyer Mr. Wasserberger. All evidentiary facts for present purposes are immaterial. For present purposes it is material to know only the facts concerning the actions of the various Courts below which shed light (1) on the question whether due process

or equal protection of law were accorded Mr. Wasserberger and (2) on the preliminary question whether he has any standing to raise constitutional issues after final judgment by the highest Court of New York State.

POINT VIII

Collateral facts warrant a direction by this Court that the respondent should be allowed double costs.

There are some collateral facts which should be shown as a guide to the Court in conjunction with respondent's application to this Court to award her double costs as provided by Subdivision (c) of § 344, Title 28, United States Code (Judicial Code, § 237, amended) read in conjunction with §878 thereof. Such double costs should be granted apparently where there appears "* * * to be no reasonable ground for granting a petition for certiorari; * * *"

Mr. Wasserberger is the former lawyer of Mrs. Rodney (fols. 118; 206; 150; 209; 211; 317; Proponent's Exhibit 3). His testimony of her statements to him (denied by her in all material respects) is testimony of statements she is alleged to have made in his office and while standing in the lawyer-client relationship. All such alleged statements were drawn out by Mr. Wasserberger according to his own version of what Mrs. Rodney said to him (fols. 166-168; 171-172; 176-177; 188). Nothing was volunteered by her,—according to Mr. Wasserberger himself. (On this aspect of the matter consider Section 353 Civil Practice Act.)

Mr. Wasserberger in this litigation apart from his own personal interests in getting commissions as a fiduciary and fees as a lawyer represented interests aggregating $4,000; and even that interest in $4,000 was pro forma because the two general legatees under the propounded paper distinct from Mrs. Rodney and her daughter Nanette

had notice of the probate contest (fol. 92) but never appeared in the proceeding. In substance only Mrs. Rodney and her daughter would have taken really important benefits under the alleged Will. Mrs. Rodney contested the Will by her own counsel. The infant daughter was represented separately by her Special Guardian. After the decision by the Surrogate's Court it was Mr. Wasserberger theoretically representing interests aggregating $4,000 (apart from his personal financial hopes) who alone appealed to the Appellate Division. The Special Guardian did not appeal.

That Mr. Wasserberger at all times was concerned deeply with getting the maximum amount of money he could from this estate was revealed by a trifling incident. During the interval between reversal by the Appellate Division and reversal of that Court by the Court of Appeals, Mrs. Rodney wanted the small sum of $2,000 on account of her share in the estate. Mr. Wasserberger tried to condition his consent to payment of the sum on an agreement that he should have his executorial commissions computed on it. (See Exhibit C attached to the prefixed affidavit of James N. Vaughan.)

When the Court of Appeals reversed the Appellate Division it became appropriate for the Surrogate's Court to make its order and decree on remittitur. In connection therewith Mr. Wasserberger applied for an allowance for legal services in the Appellate Division and in the Court of Appeals. What he wanted was $25,000. He was allowed $2,500. The Special Guardian was allowed $750. Mr. Wasserberger was also awarded costs and disbursements of $465.24 and has accepted payment of that amount. Dissatisfied with his counsel fee of $2,500 he appealed to the Appellate Division. His appeal to that Court was taken solely from so much thereof as grants him $2,500 "for his expenses for counsel on both such appeals." This appeal had been boticed for argument on September 27, 1946.

It is submitted that the foregoing collateral facts taken in conjunction with the other matters hereinabove set forth justify the conclusion that in denying the present petition for a writ of certiorari double costs should be awarded the respondent.

POINT IX

Conclusion.

The petition for the writ of certiorari should be denied

(a) Because constitutional questions were not injected into the cause until after final judgment by the highest Court of New York State and that Court at no time passed on any Federal or constitutional question:

(b) Because the action of the highest Court of New York State was strictly in accordance with its power as defined by the Constitution of New York State;

(c) Because the actual decision of the highest Court of New York State not only was within its jurisdiction and power but was explicitly anticipated as a possibility by Mr. Wasserberger himself;

And in denying the present petition this Court should exercise its power to award double costs to respondent on the ground that there is no reasonable basis for granting the writ and the petitioner had knowledge of that fact before he made this application.

Respectfully submitted,

VAUGHAN AND LYONS,
Attorneys for Respondent.

JAMES N. VAUGHAN,
of Counsel.

Appendix

Title 28, United States Code, § 344 (b) (Judicial Code § 237 (b):

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

§ 344 (c):

"(c) If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for

dismissal; but the papers whereon the writ of error was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed: Provided, That where in such a case there appears to be no reasonable ground for granting a petition for certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs, as provided in section 878 of this title."

§ 878:

"Damages and costs on affirmance. Where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court of appeals, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion."

Surrogate's Court Act, § 309:

"Power of Appellate Court: Further Testimony. Where an appeal is taken upon the facts, the Appellate Court has the same power to decide the questions of fact, which the Surrogate had; and it may, in its discretion, receive further testimony or documentary evidence and appoint a referee."

New York Civil Practice Act, § 353; § 588; § 602.

"§ 353. Attorneys and their employees not to disclose communications. An attorney or counsellor at law shall not be allowed to disclose a communication, made by his client to him, or his advice given thereon, in the course of his professional employment, nor

shall any clerk, stenographer or other person employed by such attorney or counselor be allowed to disclose any such communication or advice given thereon."

"§ 588. Appeal as of right. Appeal to the court of appeals as of right lies only

1. from a judgment or order of the appellate division, provided that the judgment finally determine an action, or the order finally determine a special proceeding, which action or proceeding was originally commenced in the supreme court, a county court, a surrogate's court, the court of claims, or an administrative agency; and provided further that,

(c) the appellate division direct a reversal or modification of the judgment or order appealed from;

"§ 602. Order of appellate division to specify grounds upon reversal or modification; presumption otherwise made. Whenever the appellate division reverses or modifies or sets aside a determination and thereupon renders a final or interlocutory judgment or order, except where it reinstates a verdict, its order shall state whether its determination is upon the law, or upon the facts, or upon the law and the facts.

1. If the determination is stated to be upon the law alone, the order shall also state whether or not the findings of fact below have been affirmed; and

2. If the determination is stated to be upon the facts, or upon the law and the facts, the order shall also

(a) specify the findings of fact which are reversed or modified, and

(b) set forth any new findings of fact made by the appellate division with such particularity as was employed for the statement of the findings of fact in the court of original instance; except that

(c) the order need not specify the findings of fact which are reversed or modified nor set forth any new findings of fact if the appeal is either from a determination duly rendered by the court without any statement of the findings of fact or from a judgment entered upon a general verdict without special findings.

If the order of the appellate division does not comply with the requirements of this section, the court of appeals shall presume that the questions of fact were not considered by the appellate division."

New York State Constitution, Article 6, § 7:

"§ 7. (Jurisdiction of court of appeals.) The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; * * *"